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No. 84-445

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FIRST ASSEMBLY OF GOD CHURCH, *et al.*,
Petitioners,

v.

CITY OF ALEXANDRIA, VIRGINIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The basis of the opposition to the petition for certiorari in this case is the City of Alexandria's claim that no fundamental tenets of faith were infringed by the city's imposition of conditions on the school which the First Assembly of God Church seeks to operate. The essence of First Assembly's tenets of faith, and those of the plaintiff parents, and the extent of the interference with such beliefs are factual questions which make the disposal of this litigation on the basis of a summary judgment motion improper. The issue before this Court is not whether the lower courts should have resolved the factual disputes in favor of the Church, but whether the lower courts were required to allow the Church the opportunity to demonstrate the impact of the city's zoning ordinance on its religious beliefs.

I. CONTRARY TO RESPONDENTS' ARGUMENT, THE CHURCH DID RAISE GENUINE ISSUES OF MATERIAL FACT WHICH NECESSITATED THE DENIAL OF THE SUMMARY JUDGMENT MOTION

In deciding a motion for summary judgment, a trial court must determine whether "there is no genuine issue as to any material fact." Fed. R. Civ. P. No. 56(c). A court has no discretionary power to grant a summary judgment motion where the adjudication does involve disputed facts. It is not the function of the trial court to resolve any existing factual issues on summary judgment and thus "the inferences to be drawn from the underlying facts contained in [the pleadings and supporting documents] must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam). Even where basic facts are undisputed, if the parties disagree regarding the material inferences which properly may be drawn from those facts, then summary judgment is improper. *Morrison v. Nissan Motor Co. LTD*, 601 F.2d 139, 141 (4th Cir. 1979). The granting of a summary judgment motion is particularly inappropriate where the resolution of an issue is dependent on the credibility or state of mind of witnesses. *Mazaleski v. Treusdell*, 562 F.2d 701, 717 (D.C. Cir. 1977), citing *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962).

In its complaint, in its presentations to both the federal District Court and the Court of Appeals, and in its petition to this Court, the Church has consistently asserted that the operation of a weekday school at the Church site in furtherance of its ministry is a fundamental tenet of its faith. *See, e.g.*, Petition at 16-17.[1]

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[1] Despite the city's characterization, First Assembly is not asserting "any religious belief regarding the size of school populations or noise abatement, [or] privacy fences." Respondents' Brief in Opposition at 2. Indeed, the Church has never claimed a right to operate a school free from reasonable regulations imposed by the city.

In an attempt to shed doubt on the existence or sincerity of the Church's beliefs, the city has pointed to the absence of any written description in the Church's "Statement of Fundamental Truths" and the fact that some Church members have sent their children to public schools. *See* Respondents' Opposition at 2-3. While these facts are not in dispute, they in no way support the city's conclusion that the Church's assertions as to its beliefs are insincere.[2]

The strength with which the Church and its adherents hold their beliefs with respect to the operation of the Church school is a question of fact which is central to the claim of infringement of religious rights and is one which can only be decided after an inquiry into believers' state of mind and the credibility of their testimony at trial. Thus, because the Church and the city disagree with respect to the material inferences to be drawn from certain facts, the District Court erred in granting the city's motion for summary judgment and the Fourth Circuit failed to correct this error. These errors are particularly glaring because they served to deny to the Church and its followers their fundamental rights to the free exercise of religion.[3]

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[2] The Church and its followers rely on the teachings of the Bible as the basis for their conviction regarding the education of their children at the Church's weekday school. In *Thomas v. Review Board of the Indiana Employment Security Division*, where Mr. Thomas also rested his actions on his interpretation of scripture, this Court held that "[c]ourts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ." 450 U.S. 707, 715 (1981). The Court concluded that "[c]ourts are not arbiters of scriptural interpretation." *Id.* at 716.

[3] The city argues that this Court, by in the past dismissing certain appeals for want of a substantial federal question, "has indicated that zoning laws harsher than those in this case . . . do not violate the First Amendment . . . ." Respondents' Opposition at 7 n.1. In the cases cited by the city, however, the courts upheld

In seeking review of the Fourth Circuit's affirmance of the District Court's granting of summary judgment, First Assembly is not simply asking this Court to weigh the evidence or to correct harmless errors of procedure. *See* Respondents' Opposition at 8 n.2, 11. The courts below, by ignoring the Church's factual assertions regarding the burden imposed on its fundamental tenets of faith, not only violated the Church's procedural rights, but also denied the Church its substantive right to the free exercise of religion. Because this case involves serious First Amendment issues and thus raises an "overriding principle of federal jurisdiction" (Respondents' Opposition at 11), this case warrants the exercise of the supervisory powers of this Court.[4]

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the validity of the zoning ordinances because they were designed to promote the public health, safety, and welfare. In the instant case, the justification the city offers for its zoning ordinance is insufficient in light of the fact that only private schools, not public schools, are subject to the special use permit (SUP) requirement in order to operate in a residential zone. *See* Petition at 18 n.9. While the city claims an interest in noise control and traffic safety around schools, the fact remains that public schools may operate in a residential zone without an SUP and without any restrictions on playground activities, fence and shrubbery borders, or student enrollment.

[4] In *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), this Court held that statutes granting government benefits to private schools raise significant First Amendment issues, despite their facial neutrality. Similarly, this case, involving as it does a government *restriction* on private schools, raises questions of religious freedom which are equally important. Thus, when a school is "substantially religious" so as to be ineligible for governmental financial assistance under the Establishment Clause, the school must also be considered sufficiently a part of a religious institution as to warrant protection under the Free Exercise Clause. *See Catholic Bishop of Chicago v. National Labor Relations Board*, 559 F.2d 1112, 1119 (7th Cir. 1977), *aff'd on statutory grounds*, 440 U.S. 490 (1979).

II. RESPONDENTS' CLAIM OF ESTOPPEL AMOUNTS TO AN ASSERTION OF TOTAL IMMUNITY FROM JUDICIAL REVIEW OF ANY APPLICATION OF A ZONING ORDINANCE

In its petition, the Church asserted that certain of the conditions imposed by the city on the operation of its Church school were invalid.[5] The city, however, claims that because the Church has received the benefits of the zoning ordinances, such as building permits, and has sought to comply with the special use permit (SUP) requirement, the Church cannot now be heard to complain that the conditions imposed on its SUP are unreasonably restrictive. Respondents' Opposition at 11-12. Thus, using the city's argument, all SUP applicants must accept *whatever* conditions the city imposes: the mere fact that a person applies for an SUP constitutes a waiver of judicial review, as well as a waiver of constitutional rights. Such unlimited authority has no support in the law.

Moreover, the city argues that the Church should be estopped from challenging the conditions which the Church itself suggested. While the Church did suggest certain restrictions in an effort to obtain an SUP (*see* Petition at 7 n.3 and Petitioners' Appendix (App.) at 15a-16a), the conditions actually imposed by the city are either materially different from those proposed by the Church or are excessive for the stated purposes of promoting noise control, traffic safety, and community tranquillity. For example, the Church stated in its SUP application that no more than 25 children would be allowed outside at one time in order to reduce noise. Petitioners' App. 15a. In addition to this condition, the city proceeded to impose the further restriction that a fence and shrubbery border be constructed for noise control and the patently absurd requirement that the 25 children allowed

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[5] The Church is not challenging all of the conditions imposed and in fact explained its compliance with many of those conditions. *See* Petition at 7 n.4.

outside could not engage in any noise generating activities. *Id.* at 29a.

The "basic principle of fairness" (Respondents' Opposition at 12) which the city invokes is nothing more than a claim of unfettered discretion in imposing SUP conditions. As such, the city's estoppel argument is without merit.

CONCLUSION

In granting and upholding the city's summary judgment motion, the lower courts improperly rejected the Church's factual assertions regarding its fundamental beliefs. Because the SUP conditions do interfere with the Church's religious beliefs, the lower courts were required to weigh that interference against the city's interest in imposing the conditions and to determine if they were the least restrictive means of achieving the city's goals. The lower courts' failure to make these findings denied to petitioners their fundamental constitutional rights. For these reasons, and for those discussed in the Church's petition, the decision of the Court of Appeals for the Fourth Circuit should be reviewed by this Court.

Respectfully submitted,

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